Teamsters Local Union No. 741, Line Drivers, Pick-up and Delivery, affiliated with International Brotherhood of Teamsters, AFL–CIO and Joint Council of Teamsters No. 28, affiliated with International Brotherhood of Teamsters, AFL–CIO and International Brotherhood of Teamsters, AFL–CIO (A.B.F. Freight System) *and* Larry Hathaway. Cases 19–CB–7025(E) and 19–CB–7170(E)

July 31, 1996

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

On September 7, 1995, Administrative Law Judge Joan Wieder issued the attached supplemental decision. The Applicants, Local Union 741 (Local 741) and Joint Council of Teamsters No. 28 (Joint Council No. 28), filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions, a supporting brief, and an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions, as modified, and to adopt the recommended Order.

This case presents two issues. The first issue is whether the Applicants have satisfied their burden of showing that they are eligible for relief under EAJA.[2] For the reasons set out below, we agree with the judge that the Applicants failed to meet their burden in this regard and that their application for EAJA relief must be denied on this basis. The second issue here is whether the General Counsel has met his burden of proving that his position in this case was substantially justified. As explained below, we reach a different conclusion from that of the judge on this issue and find that the General Counsel was substantially justified in issuing a complaint and proceeding to trial in this case. Accordingly, we find that the Applicants' application must be denied for this reason also.[3] We shall now consider these issues in turn.

In determining each Applicant's eligibility for relief under EAJA, the issue here is whether the net worth of the Applicants should be combined with that of the International and/or other unions with which they are affiliated. Since Local 741, Joint Council No. 28, and the International were the Respondents in the underlying case, the judge found, in effect, that aggregation could be appropriate here. The judge further found it was the Applicants' burden to show that aggregation was not appropriate and that the Applicants failed to meet their burden in this regard. Accordingly, the judge recommended that the Applicants' application for EAJA relief be denied.

The Applicants except to the judge's finding that they failed to meet their burden of establishing their eligibility for EAJA relief. In this regard, the Applicants contend, in effect, that they each, when considered separately, satisfy EAJA's eligibility requirements and that the judge erred by considering their relationship to the International and/or other affiliates in finding that aggregation might be appropriate here.[4] The Applicants also contend that the judge erred by assigning to them the burden of showing that aggregation was not appropriate and by finding that they had not met that burden here. For the reasons set out below, we find the Applicants' arguments without merit.[5]

Before we discuss the issue presented, however, we think that a brief review of the procedural history of this case would be helpful.

On September 13, 1994, the National Labor Relations Board issued a Decision and Order[6] in the above-entitled proceeding reversing the judge's finding that the Respondents, Teamsters Local Union No. 741 (Local 741), Joint Council of Teamsters No. 28 (Joint Council No. 28), and the International Brotherhood of Teamsters (International), violated Section 8(b)(1)(A) of the Act by, inter alia, instituting charges against and fining Larry Hathaway, a member-employee, for inquiring of the Employer when a rebid would be scheduled. Although the Board found that Hathaway's conduct was concerted activity protected under Section 7 of the Act, the Board also found that under the analysis set out in *Scofield v. NLRB*, supra, the Union's internal discipline of Hathaway was not unlawful. Accordingly, the Board found no violation and dismissed

[1] The judge cited incorrectly *Scofield v. NLRB*, 394 U.S. 423 (1969).

[2] The Equal Access to Justice Act, Pub. L. 96-481, 94 Stat. 2325, 5 U.S.C. § 504 (1980). As relevant here, EAJA provides that only those corporations, associations, or organizations are eligible for relief whose net worth does not exceed $7 million and which do not employ more than 500 people. 5 U.S.C. § 504(b)(1)(B)(ii).

[3] Member Browning would find it unnecessary to pass on the substantial justification issue, in light of the holding that the Applicants have not demonstrated their eligibility for relief.

[4] The Applicants also except to the judge's finding that they failed to provide with their application information concerning the sources of their income and net worth and also failed to provide the sources of income and net worth of the International and/or any affiliates. We find merit in this exception to the extent that the documents attached to the Applicants' application set out their sources of income and net worth. However, since the Applicants failed to provide the sources of income and net worth of the International and/or any other affiliates, we agree with the judge, for the reasons set out below, that the Applicants have failed to establish their eligibility for relief under EAJA.

[5] Member Cohen does not pass on this issue. He would dismiss the application solely on the ground that the General Counsel was substantially justified in prosecuting this case.

[6] 314 NLRB 1107 (1994).

the complaint. Thereafter, the Applicants, Local 741, and Joint Council No. 28 timely filed[7] with the Board an application for attorneys' fees and expenses pursuant to EAJA, and Section 102.143 et seq. of the Board's Rules and Regulations (Board's Rules). On November 17, 1994, the General Counsel filed a motion to dismiss the application on the grounds, inter alia, that the financial information concerning the Respondents' net worth does not comply with Section 102.147 of the Board's Rules[8] and omitted any reference to financial information of Respondent International.

On August 14, 1995, the judge issued an Order to Show Cause in which she noted that there was no mention of the International in the application and that the application failed to state whether any of the fees and expenses were attributable to the Respondents' attorney's representation of the International in the unfair labor practice proceeding. The judge therefore requested the Applicants ''to delineate . . . which expenses and/or fees, if any, were attributable to representation of the International in these proceedings.'' Regardless of whether any of the expenses and/or fees sought in the application were incurred on behalf of the International, the judge also ordered the Applicants to show cause ''why there should or should not be aggregation of net worth and employees under the circumstances of these proceedings, including Applicants [sic] apparent exclusion of Respondent International Brotherhood of Teamsters, AFL–CIO.''

On August 29, 1995, the Applicants filed a response to the Notice to Show Cause in the form of a declaration by Kenneth J. Pedersen, the Applicants' attorney who also represented the Respondents in the unfair labor practice proceeding, in which Pedersen stated that none of the fees in the application were attributable to his limited representation of the International. Further, in response to the judge's request that the Applicants show why aggregation is not appropriate here, the Applicants asserted only that the International's assets should not be aggregated with the Applicants' because all three are treated as separate ''labor organizations'' under the Labor-Management Reporting and Disclosure Act (LMRDA). In making this assertion, the Applicants relied on the following statement in the House Committee Report which accompanied the 1985 extension of and amendment to the Equal Access to Justice Act:

> Questions have arisen as to the proper application of § 504(b)(1)(B) of Title 5 and 28 U.S.C. § 2412(d)(2)(B) in the context of an application for fees by a local union which is affiliated with an international union. *Carpenters Local 1361*, 272 NLRB No. 176 (1984). It is the Committee's intent that if a local union is considered to be a separate labor organization for purposes of the Labor Management Reporting and Disclosure Act of 1959, it should be considered to be a separate organization for the purposes of the EAJA as well, and the local's entitlement of fees should be determined without regard to the assets and/or employees of the international union with which the local is affiliated.[9]

In further support of its position that the assets of the International Union and its separate local unions is inappropriate here, the Applicants relied on the Ninth Circuit's interpretation of the Committee's language in *Grason Electric Co. v. NLRB*, 951 F.2d 1100, 1105 (1991):

> Thus, the report implies that if the union is *not* considered a separate organization under the LMRDA, its assets *could* be aggregated with those of the international. But the report makes clear that if the LMRDA treats the two as separate organizations, the Board may not aggregate their assets. The Report provides no room for the Board to conduct its own examination of the relationship between the local and the international either in general or for purposes of the litigation at issue. Thus, if the Board's position remains that it will aggregate assets where a union and its international participate in ''group litigation'' (as

[7] The judge stated incorrectly the date on which the Applicants filed their application. The application was timely filed on October 13, 1994.

[8] Sec. 102.147(f) states:

> Each applicant, except a qualified tax-exempt organization or cooperative association, must provide with its application a detailed exhibit showing the net worth of the applicant and any affiliates (as defined in sec. 102.143(g)) when the adversary adjudicative proceeding was initiated. The exhibit may be in any form convenient to the applicant that provides full disclosure of the applicant's and its affiliates' assets and liabilities and is sufficient to determine whether the applicant qualifies under the standards in this part. The administrative law judge may require an applicant to file such additional information as may be required to determine its eligibility for an award.

Sec. 102.143(g) states:

> The net worth and number of employees of the applicant and all of its affiliates shall be aggregated to determine eligibility. Any individual, corporation, or other entity that directly or indirectly controls or owns a majority of the voting shares or other interest of the applicant, or any corporation or other entity of which the applicant directly or indirectly owns or controls a majority of the voting shares or other interest, will be considered an affiliate for purposes of this part, unless such treatment would be unjust and contrary to the purposes of the Equal Access to Justice Act (94 Stat. 2325) in light of the actual relationship between the affiliated entities. In addition, financial relationships of the applicant other than those described in this paragraph may constitute special circumstances that would make an award unjust.

[9] H.R. Rep. No. 120, 99th Cong., 1st Sess., pt. 1 (1985), reprinted in 1985 U.S. Code Cong. & Admin. News at 145–146.

> stated by the ALJ), despite the fact that they are considered separate under the LMRDA, this position would be in clear violation of congressional intent.

Since both Local 741 and Joint Council No. 28 are required to file separate LM-2 reports with the Department of Labor on a yearly basis and are, therefore, separate ''labor organizations'' under the LMRDA, the Applicants asserted that they were separate labor organizations for EAJA purposes as well and that therefore there should not be an aggregation of assets. We disagree.

We find that the mere fact that the Applicants file separate LM-2 reports does not automatically establish, as the Applicants contend, that an aggregation of asserts to determine EAJA eligibility is inappropriate. The Applicants' sole argument to the contrary is founded on the House Committee Report language quoted above and comments in *Grason Electric*, supra at 1105, to the effect that the Committee Report language expresses ''congressional intent'' that the Board may not aggregate the assets of applicants if the LMRDA treats them as separate organizations. With due respect to the Ninth Circuit, we find these arguments unavailing.

Initially, we note that the Committee Report language at issue here itself states that ''[i]t is the *Committee's intent*'' that if a labor union is considered to be a separate labor organization for purposes of the LMRDA, it should also be considered a separate organization for EAJA purposes as well. (Emphasis added.) Although the Ninth Circuit in *Grason Electric* interpreted the ''Committee's intent'' as ''congressional intent,'' we cannot attribute such broad authority to the Committee's language in light of the Supreme Court's finding in *Pierce v. Underwood*, 487 U.S. 552, 566–567 (1988), that the Committee Report language was not controlling on the Court because it was neither ''an authoritative interpretation of what the 1980 statute meant'' nor ''an authoritative expression of what the 1985 Congress intended.''[10] As to the former, the Court found that the committee language at issue in *Pierce* could not be an authoritative interpretation of the 1980 statute because it is the function of the courts and not the Legislature, ''*much less a Committee of one House of the Legislature*, to say what an enacted statute means.'' *Pierce v. Underwood*, supra at 566 (emphasis added). As to the latter, the Court found that the language at issue could not be an authoritative expression of what the 1985 Congress intended because the language at issue was ''not an explanation of any language that the 1985 Committee drafted'' and there was no indication that Congress thought that it was doing anything ''except reenacting and making permanent the 1980 legislation.'' Id. at 566–567.

Although the committee language at issue in *Pierce* is different from the committee language at issue here, the *Pierce* Court's reasons for finding that the committee language at issue there could not be an authoritative expression of what the 1985 Congress intended are equally valid here[11] and compel the same conclusion, i.e., that the Committee's intent vis-a-vis the aggregation of net worths cannot be an authoritative expression of what the 1985 Congress intended. Thus, for the reasons set out by the Court in *Pierce*, if one wants to clarify what Congress intended when it enacted EAJA's eligibility requirements in 1980, one must look to the legislative history of the 1980 statute for guidance, not to the subsequent 1985 House Committee Report. In this regard, as the court in *Grason Electric*, 951 F.2d at 1101–1102, itself explained:

> The EAJA grew out of Congress' concern that the high costs of litigation might deter small entities from vindicating their rights when faced with adverse action by a federal agency. See H.R. Rep. No. 1418, 96th Cong., 2d Sess. (1980), reprinted in 1980 U.S. Code Cong. & Admin. News 4953, 4984, 4988–89. To further its purpose, the Act specifies that it applies only to businesses whose net worth does not exeed $7 million and which do not employ more than 500 people. 5 U.S.C. § 504(b)(1)(B). The statute further provides that ''[a]fter consultation with the Chairman of the Administrative Conference of the United States, each agency shall by rule establish uniform procedures for the submission and consideration of applications for an award of fees and other expenses.'' 5 U.S.C. § 504(c)(1).
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> The NLRB regulations provide that ''[t]he net worth and number of employees of the applicant and *all of its affiliates* shall be aggregated to determine eligibility.'' 29 C.F.R. § 102.143(g) (1991) (emphasis added).

In *Noel Produce*, 273 NLRB 769, 769 (1984), the Board explained its intent in fashioning Section 102.143(g)'s requirement that the net worth of an ap-

[10] As the Board explained in *Hardwick Co.*, 296 NLRB 75, 75 fn. 2 (1989):

> In [*Pierce v. Underwood*] . . . the Court held that the phrase ''substantially justified'' means ''justified to a degree that could satisfy a reasonable person,'' or having a ''reasonable basis both in law and fact.'' The Court found that a sentence in the 1985 House Committee Report, H.R. Conf. Rep. No. 99-120 (1985), which defined substantial justification as ''more than mere reasonableness'' was not an authoritative interpretation of what the 1980 statute meant or of what the 1985 Congress intended.

[11] As in *Pierce*, the committee language at issue here regarding the aggregation of net worths was ''not an explanation of any language that the 1985 Committee drafted'' and there is no indication that Congress thought that it was doing anything ''except reenacting and making permanent the 1980 legislation'' in this regard.

plicant and all its affiliates shall be aggregated in determining the applicant's eligibility for EAJA relief:

> Section 102.143(g) is merely an adoption of the rule recommended by the Administrative Conference of the United States which received and considered comments on the validity of the rule. Although EAJA is silent on the matter, *the requirement implements the purpose of that Act, which sought to establish ''financial criteria which limit the bill's application to those persons and small businesses for whom costs may be a deterrent to vindicating their rights*.'' [H.R. Rep. No. 96-1418 at 15 (1980).] Parties that meet the eligibility standard only because of technicalities of legal or corporate form, *while having access to a large pool of resources from affiliated companies*, do not fall within this group of intended beneficiaries. [Emphasis added.]

Thus, the Board's aggregation requirement is consistent with Congress' intent to limit EAJA's application only to those ''for whom costs may be a deterrent to vindicating their rights'' and furthers that purpose by foreclosing EAJA eligibility to applicants which have access to ''a large pool of resources'' from affiliated entities. Since, for the reasons set out above, we have found that the 1985 House Committee Report language relied on by the Applicants, which merely expresses the intent of ''a Committee of one House of the Legislature,'' is not an authoritative expression of congressional intent, we adhere to our position, which we find to be consistent with the purposes of EAJA as set out in the legislative history accompanying its enactment, that net worths of affiliates shall be aggregated as provided in Section 102.143(g) of the Board's Rules and Regulations (see fn. 8, supra).

Of course, mere affiliation, without more, would not require the aggregation of net worth contemplated in Section 102.143(g) of the Board's Rules.[12] As there explained, affiliation is found and aggregation is appropriate where one entity ''directly or indirectly controls'' another entity, or where the entity is itself ''directly or indirectly . . . control[led]'' by the other.[13] Where affiliation is present, however, it is the applicant's burden to show that control is lacking and that aggregation of net worths would therefore be inappropriate. See, e.g., *Pacific Coast District Council (Foss Shipyard)*, supra at 157.

In the present case, in response to the Notice to Show Cause why aggregation of net worths would not be appropriate, the Applicants relied on the House Committee language discussed above to argue that aggregation is not warranted. Since we have found, for the reasons set out above, that the Applicants' contentions in this regard are without merit, we agree with the judge that the Applicants have failed to meet their burden of showing that aggregation of assets is not warranted here. We find therefore that the Applicants have failed to establish their eligibility for EAJA relief and adopt the judge's finding that their application should be denied.

As to the second issue presented here, we find, contrary to the judge, that the General Counsel was substantially justified in filing a complaint and proceeding to trial in this case.[14] As explained in *Blaylock Electric*, 319 NLRB 928, 929 (1995):

> Pursuant to Section 504(a)(1) of EAJA, a party, which has prevailed in litigation before a Federal Government agency is entitled to an award of attorney's fees and expenses incurred in connection with that litigation unless the government can establish that its position was ''substantially justified.'' In *Pierce v. Underwood*, 108 S.Ct. 2541, 2550 at fn. 2 (1988), the Supreme Court defined the phrase as meaning ''justified to a degree that could satisfy a reasonable person'' or ''justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact,'' and, in *Jansen Distributing Co*., 291 NLRB 801 at fn. 2 (1988), the Board adopted this definition for the above phrase.

In her supplemental decision, the judge stated, and we agree, that there is no close issue of fact here. Thus, the only issue is whether there was a reasonable basis in law on which the General Counsel could proceed in this case.

As explained above, the judge originally found the violation alleged, that the Respondents had violated

[12] See *Plumbers Local 32 (Ramada, Inc.)*, 307 NLRB 473, 477 (1992).

[13] As the Board explained in *Pacific Coast District Council (Foss Shipyard)*, 295 NLRB 156, 156–157 (1989):

> The General Counsel does not take the position that the mere fact of affiliation of one labor organization with another requires aggregation of those organizations' net worths or of the number of employees for the purpose of determining eligibility under EAJA. Rather, the General Counsel's position is that aggregation is appropriate where, on the facts of a particular case, it is clear that a labor organization is *controlled*, directly or indirectly, by another labor organization.
>
> We find merit in the the General Counsel's position. Indeed, as the General Counsel points out, this has been the Board's consistent position. [Emphasis in original.]

[14] Sec. 102.144(a) of the Board's Rules and Regulations states that:

> [a]n eligible applicant may receive an award for fees and expenses incurred in connection with an adversary adjudiation or in connection with a significant and discrete substantive portion of that proceeding, unless the position of the General Counsel over which the applicant has prevailed was substantially justified. The burden of proof that an award should not be made to an eligible applicant is on the General Counsel, who may avoid an award by showing that the General Counsel's position in the proceeding was substantially justified.

Section 8(b)(1)(A) of the Act by instituting charges against and fining Hathaway, a member-employee, because Hathaway inquired of the Employer when a rebid would be scheduled. In reaching this conclusion, the judge found that Hathaway's conduct in making the inquiry was concerted activity protected under Section 7 of the Act. The judge further found that an employee's right to seek redress of a grievance from his employer embodied an overriding policy of the labor laws to which a union's right to discipline its members must yield.

The Board in its decision in the underlying case agreed with the judge that Hathaway's right to present grievances to his Employer was protected under Section 7 of the Act, and disagreed with her only on the difficult issue of where to place the balance between that right and a union's right to discipline its members internally. In her supplemental decision, however, the judge stated that, were the issue before her, she would find that the Applicants were entitled to an award of attorneys' fees because the Board had found that ''there was no reasonable basis in law for the theory General Counsel promulgated.'' The judge determined, in effect, that because the Board found that the General Counsel's ''novel theory'' was not viable, it was therefore not substantially justified.[15] We disagree.

In finding that the General Counsel's theory here was substantially justified, we emphasize that the Board in the underlying case agreed with the judge's finding in her original decision that ''Hathaway was engaged in concerted activity protected under Section 7 of the Act when he inquired of Porter [the Employer's manager] when a rebid would occur.'' Thus, the Board explained that the only issue was ''whether the Respondents violated Section 8(b)(1)(A) by filing charges against and disciplining Hathaway for engaging in activity protected under Section 7.'' *Teamsters Local 741 (A.B.F. Freight)*, 314 NLRB at 1108. Although the Board went on to find that the Respondent's action was protected under the proviso to Section 8(b)(1)(A) of the Act,[16] the resolution of this issue required the Board to analyze the difficult problem of how to resolve ''the interplay between Section 8(b)(1)(A) and its proviso.'' Id. at 1108. For, while the proviso to Section 8(b)(1)(A) leaves a union free to enforce internal rules against its members, if the union's rule ''invades or frustrates an overriding policy of the labor law, the rule may not be enforced, even by fine or expulsion, without violating Section 8(b)(1).'' Id., quoting *Scofield v. NLRB*, 394 U.S. 423, 429 (1969).

Although the Board resolved this issue differently from the judge and dismissed the complaint, such a result does not require a finding that the General Counsel's theory was not substantially justified. For, as the judge herself stated, quoting *Lathers Local 46 (Building Contractors)*, 289 NLRB 505, 506 (1988):

> Congress has emphasized that no adverse inferences are to be drawn from the fact that the Government did not prevail in the adversary adjudication. Nor does the standard require the Government to establish that its decision to litigate was based on a substantial probability of prevailing.

The General Counsel may carry its burden of proving that its position was substantially justified ''by showing its position advanced 'a novel but credible extension or interpretation of the law.''' *Timms v. U.S.*, 742 F.2d 489, 492 (9th Cir. 1984), quoting *Hoang Ha v. Schweiker*, 707 F.2d 1104, 1106 (9th Cir. 1983).

We find that the General Counsel has satisfied its burden here because its position advanced a ''novel but credible extension or interpretation of the law.'' In this regard, as noted above, the sole issue here concerns a question of law, not of fact. Further, the Board did not find that Hathaway was not involved in conduct protected under Section 7 by seeking to present grievances to his Employer, only that his Section 7 right must yield to the Union's right to discipline its members. The resolution of this issue required the Board to balance rights which it had not previously weighed.[17] In these circumstances, we find that the General Counsel's position was substantially justified. For these reasons also, we find that the Application must be denied.[18]

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[15] In finding that the General Counsel's theory was not substantially justified, the judge also seems to have relied on the fact that the General Counsel did not appeal the Board's decision to dismiss the complaint. We find such reliance misplaced as, inter alia, the General Counsel is not a ''person aggrieved'' within the meaning of Sec. 10(f) of the Act who has the right to appeal a final order of the Board.

[16] Sec. 8(b)(1)(A) states in relevant part:

> (b) It shall be an unfair labor practice for a labor organization or its agents—
>
> (1) to restain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . . .

[17] Thus, contrary to the judge's apparent finding, this is not a case in which the General Counsel decided to ''take a long shot'' by, for example, arguing that controlling precedent should be overruled. On the contrary, this was a case of first impression that required the balancing of apparently conflicting and opposing rights.

[18] In view of our denial of the Application, we find it unnecessary to address the issue of whether the amounts claimed by the Applicants are reasonable.

ORDER

The recommended Order of the administrative law judge is adopted and the application is denied.

Max Hochanadel, Esq., for the General Counsel.
Kenneth Pedersen, Esq. (Davis, Roberts & Reid), of Seattle, Washington, for the Respondents.
Larry Hathaway, in pro se, of Kent, Washington, for the Charging Party.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

JOAN WIEDER, Administrative Law Judge. The Applicants, Teamsters Local Union No. 741, Line Drivers, Pickup and Delivery (Local 741) and Joint Council of Teamsters No. 28 (Joint Council 28), pursuant to the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, et seq., seek fees and expenses from April 9, 1992, through March 30, 1993. Applicants also seek license to supplement their application ''as this matter proceeds'' for its successful defense of an unfair labor practice complaint issued April 14, 1992, and for its prosecution of this claim under the EAJA. The application was timely filed October 18, 1994, based on the Board's decision in the underlying case, *Teamsters Local 741 (A.B.F. Freight)*, 314 NLRB 1107 (1994), wherein the Board overruled my finding of a violation and determined, as a matter of law, the Respondents had not violated the Act. The Board ordered the application be referred to me.

On November 17, 1994, the General Counsel filed a motion to dismiss the application asserting (1) the financial information concerning the Respondents' net worth does not comply with Section 102.147 of the Board's Rules and Regulations and omits any reference to financial information of Respondent International Brotherhood of Teamsters, AFL–CIO (International), and (2) the hours claimed by Respondents' attorney is ''totally unreasonable,'' also it should be reduced by the claims for services rendered before issuance of the complaints. The General Counsel avers, in the alternative, it was ''substantially justified''[1] in issuing the complaints.

The pleadings have not raised issues that warrant holding a hearing, therefore, on the entire record, including the underlying unfair labor practice proceedings and the briefs, memoranda, declarations, and motions filed by the General Counsel and Applicants, I make the following

FINDINGS

Eligibility

The EAJA defines parties that may recover reasonable attorney fees when they are the prevailing party, if they meet certain statutory criteria.[2] The General Counsel argues the net worth of all Respondents must be aggregated in determining eligibility for an EAJA award. The Respondents to this proceeding were Local 741, the Joint Council, and the International. Citing *Pacific Coast District Council (Foss Shipyard)*, 295 NLRB 156 (1989), the General Counsel claims aggregation of revenues is appropriate where it is clear a labor organization is controlled directly or indirectly by another labor organization. The Board adopted this position in the *Foss* case. Id. at 157.[3] According to the General Counsel, the Applicants bear the burden of establishing they are not controlled by the International, thus their application must be dismissed.

It appears the General Counsel is maintaining aggregation is appropriate where the labor organizations are joint Respondents. The General Counsel failed to argue the provisions of the International's constitution grants it significant and/or substantial control over its locals and joint boards, and this authority constitutes ''special circumstances'' requiring the aggregation of assets. Further, neither the Applicants nor the General Counsel provided any description of the International's net worth. *Carpenters Local 1361 (Atchinson Foundation)*, 272 NLRB 1118 (1984).

Applicants argue their assets may not be aggregated with those of the International Union. In support of this position, Applicants cite the *Foss* case, supra, and H.R. Rep. No. 120, 99th Cong., 1st Sess., pt. 1 (1985), reprinted in 1985 U.S. Code Cong. & Admin. News 136–137 at 145–146 as follows:

> Questions have arisen as to the proper application of § 504(b)(1)(b) of Title 5 and 28 U.S.C. § 2412(d)(2)(B) in the context of an application for fees by a local union which is affiliated with an international union. *Carpenters Local 1361*, 272 NLRB No. 176 (1984). It is the Committee's intent that if a local union is considered to be a separate labor organization for purposes of the Labor Management Reporting and Disclosure Act of 1959, it should be considered to be a separate organization for the purposes of the EAJA as well, and the local's entitlement of fees should be determined without

[1] The term substantial was defined, interpreting the Administrative Procedure Act, 5 U.S.C. § 706(2)(E), as ''such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'' *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). In *Pierce v. Underwood*, 487 U.S. 552 (1988), the Court found the term ''substantially justified'' means ''justified to a degree that could satisfy a reasonable person. That is no different from the 'reasonable basis both in law and fact' formulation adopted by the Ninth Circuit and the vast majority of other Courts of Appeals that have addressed this issue.'' (Citations omitted.)

[2] EAJA provides, as here pertinent:

> [W]hich is ''a corporation'' but excludes (i) any ''corporation'' whose net worth exceeds $7,000,000 at the time the adversary adjudication was initiated . . . and (ii) any ''corporation'' having more than five hundred employees at the time the adversary adjudication was initiated [5 U.S.C. § 504(b)(1)(B)].

[3] The Board noted at p. 157:

> Our examination of the legislative history of EAJA's reenactment convinces us that Congress did not intend to preclude aggregation as a means of determining a union's eligibility under EAJA. Instead, Congress meant only to ensure that a local union would not be ineligible for an EAJA award simply because it was affiliated with an International union. As the General Counsel notes, the House report's language does not address the issue presented in this case. Here each Applicant is a trades council, not a local union, and the issue is whether, in determining each Applicant's eligibility for an award under EAJA, the net worth of each Applicant should be combined with that of its constituent members, not with that of the International union or unions with which it is affiliated.

> regard to the assets and/or employees of the international union with which the local is affiliated.[4]

Applicants contend there should be no aggregation of assets with the International because they file separate LM-2 reports with the Department of Labor and thus are separate ''labor organizations'' under the LMRDA.

The House Committee Report quoted by Applicants appears to not refer to an amendment of EAJA but rather to the application of existing criteria in the EAJA statute. The weight to be accorded language in the House Report concerning statutory provisions that were left unchanged in the reenactment of EAJA was set forth in *Pierce v. Underwood*, supra. The Court held the phrase ''substantially justified'' means ''justified to a degree that could satisfy a reasonable person,'' or having a ''reasonable basis both in law and fact.'' The Court found the sentence in the 1985 House Committee Report, H.R. Conf. Rep. No. 99-120, which defined substantial justification as ''more than mere reasonableness'' was not an authoritative interpretation of what the 1980 statute meant or of what the 1985 Congress intended. See also *Hardwick Co*., 296 NLRB 75 fn. 2 (1989).

At the commencement of the complaint proceeding, Kenneth Pedersen stated he represented Teamsters Local Union No. 741 and Joint Council of Teamsters No. 28 and he was making an appearance on behalf of the International limited to some prehearing motions, including admitting, for the purposes of this case only, the Joint Council is a labor organization under the Act. Pedersen also moved for permission to file a posthearing brief on behalf of the International Union.

The Applicants did not break down the fee request to reflect which, if any, of the requested fees and or expenses were attributable to representation of the International Union in these proceedings. The Applicants failed to provide the LM-2 reports of the International Brotherhood of Teamsters, any affiliated joint councils and locals; in fact, it failed to indicate if they had any other affiliations. The International was clearly one of the Respondents in the underlying unfair labor practice proceedings represented, at least in part, by K. Pedersen. The fee request is filed only in the names of the Local and Joint Council.

The Applicants bear the evidentiary burden of proof, including the burden of proving aggregation of net worth of the Applicants with the International or any other affiliates was unwarranted. *Pacific Coast District Council (Foss Shipyard)*, supra. The International Union was a party to the underlying proceeding but was not included as one of the EAJA Applicants.

An Order to Show Cause was issued requiring the Applicants to file affidavits, certified statements, or declarations under penalty of perjury, to provide information in support of their claimed eligibility for an award under EAJA. The Applicants' application did not provide information concerning the source of the Local's and Joint Council's income and no net worth statements were provided for the International Union and/or any affiliates. Moreover, the Applicants failed to indicate whether the International Union paid a share of the legal expenses. It is unquestioned the International was a joint participant in the conduct which gave rise to the underlying proceeding and a real party-in-interest.

The Applicants also failed to establish which Respondent paid the attorney's fees, and if all paid a share, what each party paid. Therefore, the Applicants failed to establish they were qualifying parties. As the Board held in *Grason Electric Co*., 296 NLRB 872 fn. 3 (1989), citing *Noel Produce*, 273 NLRB 769 (1984):

> Parties that meet the eligibility standard only because of technicalities of legal or corporate form, while having access to a large pool of resources from affiliated companies, do not fall within [the] group of intended beneficiaries.

Only the Applicants filed a declaration in response to the Order to Show Cause. Pedersen declared he only represented the International at the hearing:

> for the limited purpose of presenting the International's motion to amend its answer so as to admit the allegations in . . . [the] Complaint that Mr. Larry Weldon was an agent of Local 741, that Mr. Arnie Weinmeister was the President of Joint Council No. 28, that Joint Council No. 28 was a ''labor organization'' under the Act, and that ABF Trucking met the commerce requirements of the Act and hence was an ''employer'' under the Act. I also presented a written motion, prepared by attorneys for the International Union, in which the International requested permission to file a post-hearing brief in the case.

Applicants also declared the written motion presented at hearing by Pedersen was prepared by counsel for the International. His representation of the International was to present an amendment similar to one he was presenting on behalf of Applicants. He did not bill the International for this service or the telephone call which resulted in his agreement to represent the International in this limited manner. Pedersen claims his other telephone calls with the International's attorney, Ms. Caira, were billed to his client because they were ''discussing the common allegations against our clients and included discussion of strategy in presenting a defense. . . . none of the fees included in the Application are attributable to my limited representation of the International Union.''

I find Applicants have not established their EAJA eligibility based on the application, as supplemented by the declarations of Pedersen. While the Board has recognized mere affiliation with an International Union does not require aggregation, the Applicant still maintains the burden of establishing its eligibility under EAJA. As previously noted, ''the evidentiary burden is on the Applicants to establish EAJA eligibility'' as required by the Board's Rules and Regulations, general jurisprudential principles and on the ''statute's burden requirements.''[5]

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[4] Applicants also cited *Grason Electric Co. v. NLRB*, 951 F.2d 1100, 1105 (9th Cir. 1991), which held:

> [I]f the Board's position remains that it will aggregate assets where a union and its international participate in 'group litigation'. . . despite the fact that they are considered separate under the LMRDA, this position would be in clear violation of congressional intent.

National Truck Equipment v. NHTSA, 972 F.2d 669, 673–674 (6th Cir. 1992). I am required to follow Board precedent.

[5] *Pacific Coast District Council (Foss Shipyard)*, supra at 157, where the Board also held:

The mere fact the International was also named as a Respondent in this proceeding does not establish it has direct or indirect control of the Applicants. Here, the Applicants established they are separate labor organizations for the purpose of the Labor-Management Reporting and Disclosure Act of 1959. The reply to the Order to Show Cause established Applicants were separately represented from the International, except for a small courtesy extended by Applicants counsel to a co-Respondent. This courtesy, without more, in insufficient to establish ''special circumstances.''

However, the Applicants have failed to meet their burden of establishing they were not controlled directly or indirectly by the International. The Application fails to demonstrate the nature of any affiliations, which must be disclosed under the Board's Rules and Regulations. (See Sec. 102.147(f), quoted below.) The sources of the International's, Local's and Joint Council's financial support were not placed in evidence. For example, the Applicants did not attempt to demonstrate they are self-supporting or that all their financial support is derived from fees from only their members. There was no demonstration the Applicant Local was the only or predominate support of Joint Council No. 28. The source of Joint Council No. 28's income was also not revealed in the application, it may derive most if not all of its support from the International or other locals which could constitute special circumstances warranting aggregation with other affiliates. There was no evidence of whether the International's and Applicants' governing documents grant the International significant and/or substantial control over its locals and joint councils. This authority could constitute ''special circumstances'' requiring the aggregation of assets.

The Boards Rules and Regulations, particularly Section 102.147(f), provides:

> Each applicant, except a qualified tax-exempt organization or cooperative association, must provide with its application a detailed exhibit showing the net worth of the applicant and any affiliates (as defined in sec. 102.143(g)) when the adversary adjudicative proceeding was initiated. The exhibit may be in any form convenient to the applicant that provides full disclosure of the applicant's and it affiliates' assets and liabilities and is sufficient to determine whether the applicant qualifies under the standards in this part.

That Congress did not intend for fee awards to be automatic is established by the fact that the prevailing party is required to make an application for an award of fees and expenses, to meet certain net worth standards, and to comply with certain initial procedures as established by the agency involved. [See S. Rep. No. 253, 96th Cong., 1st Sess. (1979); H.R. Rep. No. 1418, 96th Cong. 10, 2d Sess. (1980), Pub. L. 96-481, p. 4984 (1980).] Further, the legislative history also shows that it was Congress' belief that the allocation of the burden of proof should be on the party who has readier access to and knowledge of the facts in question. Thus the burden of proving financial eligibility is clearly placed on the applicant. Only when the applicant has proven eligibility, does the burden shift to the Government to prove that its action was ''reasonable or substantially justified'' or ''that special circumstances'' make an award unjust, because, at that point, the Government is the party in control of the evidence needed to prove the reasonableness of its action.

Applicants have failed to meet the requirements of Section 102.147(f) for they have not established they have no affiliates as defined in Section 102.143(g) or that such affiliates' assets or employee complements should not be aggregated with theirs to determine their eligibility under the EAJA. As noted in *Pacific Coast District Council (Foss Shipyard)*, supra, the Board's Rules and Regulations were not altered by the House Report cited above.

The failure of the Applicants to meet their burden of demonstrating the amount if any financial support they receive from affiliates, the nature and extent of any control exercised by such affiliates, and the bargaining function performed by each of the Respondents on behalf of themselves and each other requires the conclusion the Applicants have failed to establish they can exist alone without the support and control of other locals, joint councils, and/or the International. The Applicants never demonstrated other locals were not members of Joint Council No. 28. The financial relationships between Applicants, the International, other locals, and joint councils were not addressed in the application and other supporting documents. The operating structures of the Applicants and their relationships to each other and affiliated locals, joint councils, and the International were not provided. Thus, there is no foundation to determine there was a lack of direct or indirect control by the International and/or other locals and joint councils of the Applicants. Based on the information provided, I am constrained to conclude the Applicants have failed to demonstrate they were entitled to an exception to Section 102.143(g).[6] The Applicants have not established their eligibility to receive an award.

In the event the Board finds the filing of separate LM-2s with the Department of Labor establishes their eligibility to receive an award without regard to the source of their funds or the issue of direct or indirect control, as Applicants claim, then I find they are entitled to an award based on the following

Substantial Justification

Section 504(a)(1) of the EAJA provides the adjudicating agency ''shall award to a prevailing party other than the United States, fees and other expenses incurred in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency as a party to the proceeding was substantially justified, or that special circumstances make anaward unjust.'' Section 102.144 of the Board's Rules provides:

[6] Sec. 102.143(g) provides:

> The net worth and number of employees of the applicant and all of its affiliates shall be aggregated to determine eligibility. Any individual, corporation, or other entity that directly or indirectly controls or owns a majority of the voting shares or other interest of the applicant, or any corporation or other entity of which the applicant directly or indirectly owns or controls a majority of the voting shares or their interest, will be considered an affiliate for purposes of this part, unless such treatment would be unjust and contrary to the purposes of the Equal Access to Justice Act (94 Stat. 2325) in light of the actual relationship between the affiliated entities. In addition, financial relationships of the applicant other than those described in this paragraph may constitute special circumstances which may make an award unjust.

> (a) An eligible applicant may receive an award for fees and expenses incurred in connection with an adversary adjudication or in connection with a significant and discrete substantive portion of that proceeding, unless the position of the General Counsel over which the applicant has prevailed was substantially justified. The burden of proof that an award should not be made to an eligible applicant is on the General Counsel, who may avoid an award by showing that its position in the proceeding was reasonable in law and fact.
>
> (b) An award will be reduced or denied if the applicant has unduly or unreasonably protracted the adversary adjudication or if special circumstances make the award sought unjust.

The General Counsel argues it was ''substantially justified'' in issuing complaints in these proceedings. As noted above, in *Pierce v. Underwood*, 487 U.S. 552, the Court defined ''substantially justified'' as ''justified to a degree that could satisfy a reasonable person,'' or having a ''reasonable basis both in law and fact.'' The General Counsel asserts this burden has been met, because I found in its favor. Citing *Lion Uniform*, 285 NLRB 249, 254 fn. 33 (1987). The General Counsel also notes this was a case of first impression and the proposal of a ''novel theory'' which was reasonably founded in applicable decisional law. Citing *Timms v. U.S.*, 742 F.2d 489 (9th Cir. 1984); *International Maintenance Systems Group*, 267 NLRB 1136 (1983); *University of New Haven*, 279 NLRB 294 (1986). There is no claim there was a close question of fact, only denominated questions of law. See *Laborers Local 270*, 291 NLRB 432 (1988).

In order to defeat an application for fees and expenses, the General Counsel must prove his position in the unfair labor practice proceeding was substantially justified at each readily identifiable stage of the proceeding. ''Congress has emphasized that no adverse inferences are to be drawn from the fact that the Government did not prevail in the adversary adjudication. Nor does the standard require the Government to establish that its decision to litigate was based on a substantial probability of prevailing.'' *Lathers Local 46 (Building Contractors)*, 289 NLRB 505 (1988). See also S. Rep. No. 253, 96th Cong., 1st Sess., 6; H.R. Rep. No. 1418, 96th Cong., 2d Sess., 16 reprinted in 1980 U.S. Code Cong. & Admin. News 4953, 4990.

The Applicants claim the position of the General Counsel was not ''substantially justified.'' I agree with the Applicants. The Board found the Supreme Court decision in *Scaffold v. NLRB*, 394 U.S. 423, 428 (1969), clearly dictated a dismissal of the underlying proceedings and that there was no overriding policy requiring or mitigating in favor of finding a violation. In sum, the Board found there was no reasonable basis in law for the theory the General Counsel promulgated. The General Counsel did not appeal the Board's determination. The General Counsel's novel theory was determined to be not viable, thus not substantially justified. *Nunes-Correia v. Haig*, 543 F.Supp. 812 (D.D.C. 1982), followed in *Russell v. National Mediation Board*, 775 F.2d 1284 (5th Cir. 1985).

The General Counsel has failed to establish there are special circumstances which make an award unjust. According to the Board's decision in the underlying case, this was not a viable novel issue, and the complaint was not a credible extension and interpretation of the law. 314 NLRB 1107. See also *American Air Parcel Forwarding Co. v. U.S.*, 697 F.Supp. 505 (1988). Thus, the General Counsel has failed to meet its burden of demonstrating its position that the underlying case had a reasonable basis in law for the theory it propounded or there are special circumstances which make an award unjust. *Russell v. National Mediation Board*, supra; *Devine v. Sutermeister*, 733 F.2d 896 (Fed. Cir. 1984); *Walton v. Lehman*, 570 F.Supp. 490 (1983); *Dougherty v. Lehman*, 711 F.2d 555 (3d Cir. 1983).

As the Court found in *Keasler v. U.S.*, 766 F.2d 1227 (8th Cir. 1985), citing with approval in *Spencer v. NLRB*, 712 F.2d 539, 558 (D.C. Cir. 1983):

> [T]he importance of a legal issue may justify a decision by government counsel to 'take a long shot'—for example, to argue on appeal for the overruling of a controlling precedent unfavorable to the United States, even though the likelihood of obtaining such a judgment is slight. . . . [W]hen the government loses such a case, it should be obligated to reimburse the private party for his attorney's fees.

Reasonableness of Amount Claimed

The General Counsel argues the Applicants have claimed an unreasonable number of hours. Moreover, the General Counsel correctly asserts the fees incurred prior to the issuance of the complaint are not compensable under EAJA. *Hardwick Co.*, 296 NLRB 75. The standard described in *Pierce v. Underwood*, supra, is the ''abuse-of-discretion standard.'' *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).

As here pertinent, Section 102.145 of the Board's Rules provides awards will be based on rates customarily charged by attorneys, subject to a limitation of $75 per hour, plus reasonable expenses. The claimed fees and expenses through March 1992 total 146 hours at the maximum allowable rate of $75 for a total of $10,950 plus a $340.16 expense of acquiring the transcript for a total of $11,290.16. The General Counsel does not argue the $75-per-hour fee is an excessive or unreasonable rate of compensation.

The General Counsel has only pointed to the fees requested prior to the issuance of the complaint as being not compensable. The Applicants argue the expenditures prior to the issuance of the complaint in this case occurred ''when it was learned that General Counsel intended to issue a complaint against Respondents.'' Without more, I find this argument unpersuasive. The proceeding is not adversarial until the complaint is issued, thus requests for fees and expenses incurred in contemplation of an adversary proceeding have not been shown to be compensable under the EAJA, at least where, as here, the Applicants failed to explicate the circumstances under which it learned of the General Counsel's intent to issue a complaint and why it had good cause to consider the investigation phase of the proceeding at an end replaced by an adversarial proceeding.

There are no claims the Applicants have ''unduly or unreasonably protracted'' these proceedings and no ''special circumstances'' have been advanced that would lead to a finding the ''award sought [is] unjust.'' Accordingly, if the Board finds the Applicants are eligible, I would determine this claim by the General Counsel is meritorious only to those fees and charges occurring prior to the issuance of the

complaint. The claim for compensation for fees and expenses incurred prior to issuance of the complaint should be disallowed. The remainder of the claim would be allowable and proper and the award would be without prejudice to the Applicants' rights to submit additional or amended claims in the event of further litigation in this proceeding.

ORDER

It is ordered that the application of Teamsters Local Union No. 741, Line Drivers, Pickup and Delivery, affiliated with International Brotherhood of Teamsters, AFL–CIO and Joint Council of Teamsters No. 28, affiliated with International Brotherhood of Teamsters, AFL–CIO, for an award under the Equal Access to Justice Act be, and is, dismissed.